ACCOUNTANCY EUROPE.

Policy update

Tax Policy Update

27 November – 8 December

HIGHLIGHTS

- European Parliament: PANA hearing on Paradise Papers – 28 November
- European Commission: new proposal to reform VAT administrative cooperation and Eurofisc – 30 November
- Council: ECOFIN finds agreement on digital tax, non-cooperative jurisdictions, VAT for e-commerce – 5 December

European Commission

Commissioner Vestager speaks out against tax intermediaries – 28 November

Commissioner Vestager has recently increased her criticism of tax intermediaries that facilitate tax planning.

In her recent speech delivered at the Bocconi University Academic Year Opening Ceremony, the Commissioner states that recent leaks have continued to show the instrumental role of intermediaries in using loopholes. She singles out accountants as one of the key intermediaries.

Commission proposes a reform of VAT administrative cooperation and Eurofisc – 30 November

The European Commission has published a legislative proposal to better fight VAT fraud, strengthen administrative cooperation on VAT and enhance Eurofisc. The proposal comes in the form of amendments to the Regulation 904/2010 on administrative cooperation to tackle VAT fraud.

This proposal was initially supposed to be accompanied by an initiative to improve the EU VAT system for SMEs, and to grant greater leeway for member states on setting their national VAT rates. However, these two initiatives have now been postponed to 16 January.

The proposal consists of four main action areas:

- **Strengthening cooperation between member states:** set up an online system for information sharing within Eurofisc. This system would enable member states to process, analyse and audit data on cross-border activity to ensure a swift and accurate risk assessment

    - **Joint audits:** allow officials from two or more tax authorities to form a single audit team to combat fraud – in order to improve member states' capacity to check cross-border supplies, in the e-commerce sector. Eurofisc would also be granted new powers to coordinate cross-border investigations

- **Better working with other law enforcement bodies:** open new lines of communication and data exchange between tax authorities and European law enforcement bodies on cross-border activities suspected of leading to VAT fraud: OLAF, Europol and the newly created European Public Prosecutor Office (EPPO). This would enable to cross-check national information with criminal records, databases and other information held by Europol and OLAF, in order to identify fraudsters and their networks
- **Sharing of key information on imports from outside the EU and on vehicle registration:** further improve information sharing between tax and customs authorities for certain customs procedures (CPs) currently open to VAT fraud, such as CP 42. Currently, EU's VAT system enables for goods arriving from outside the EU with a final destination of one member state to arrive in the EU in another member state and transit onwards VAT-free. VAT is only charged when the goods reach their final destination. The Commission fears that this can be abused to divert goods to the black market and circumvent the payment of VAT. Under the proposed revised rules, information on incoming goods would be shared and cooperation strengthened between tax and customs authorities in all member states
- **Access to car registration data:** grant Eurofisc officials access to car registration data from other member states. The reasoning is that currently, trading in cars is sometimes subject to fraud due to the difference in how VAT is applied to new and used cars. Recent or new cars, for which the whole amount is taxable, can be sold as second-hand goods for which only the profit margin is subject to VAT

As with all tax files, member states will have to agree unanimously on the proposal. The European Parliament only submits its non-binding opinion, but this opinion is needed in order for the proposal to become EU law. Depending on how controversial the proposals are deemed to be by certain member states, the process will take several months at best.

Taxation in 2016: The tax-to-GDP ratio slightly up in both the EU and the euro area – 7 December

The Commission has published latest Eurostat statistics related to tax.

The overall tax-to-GDP ratio stood at 40.0% in the EU in 2016, an increase compared with 2015 (39.7%). In the euro area, tax revenue accounted for 41.3% of GDP in 2016, slightly up from 41.2% in 2015. The tax-to-GDP ratio is therefore on the increase again in both zones after a slight decline recorded in the previous year.

Commission publishes latest monthly infringements package, refers Austria to Court over VAT treatment of resale rights of art – 7 December

The Commission has published its monthly infringements package which, once again, includes a number of tax-related decisions.

For example, the Commission is referring **Austria** to the Court of Justice of the EU (CJEU) for a suspected incorrect application of VAT to royalty payments paid to artists for the resale of works of art. The Commission also asks **Lithuania** to align its national tax rules on the capital contribution to companies in the form of real estate with EU law, and calls on **Belgium** to transpose new transparency rules for the exchange of tax rulings, amongst others.

Commission publishes Code of Conduct on withholding tax – 11 December

The Commission has published its long-awaited new guidelines on withholding taxes to help member states reduce costs and simplify procedures for cross-border investors in the EU.

This new Code of Conduct offers solutions for investors who, as a result of how withholding taxes are applied, end up paying taxes twice on the income they receive from cross-border investments.

Implementation of the Code of Conduct is voluntary for member states. It provides a snapshot of the problems faced by cross-border investors and explains how more efficient tax procedures can be put in place, drawing notably on existing best national practices. The Code outlines a range of practical ways for member states to address key issues including:

- Measures to help smaller investors for whom the rules on the refund of withholding tax are overly complex
- The creation of user-friendly digital forms to apply for withholding tax relief in the case of overpayment
- A reliable and effective timeframe for tax authorities for the granting of withholding tax relief
- A single point of contact in member states' tax administrations to deal with questions from investors on withholding tax

The Code is a part of the Commission's Capital Markets Union (CMU) initiative, which aims for integrated capital markets in the EU. A core tenant of the CMU project is the removal of barriers for cross-border investment, including burdensome and incompatible national rules that pose obstacles for investors' cross-border activities.

European Parliament

PANA hearing on Paradise Papers, MEP calls for splitting audit and tax functions of firms – 28 November

The PANA Committee of the European Parliament has held a public hearing on Paradise Papers with journalists of the International Consortium of Investigative Journalists (ICIJ) as well as **Commissioner Moscovici**.

During the hearing, the MEP **Pirkko Ruohonen-Lerner (ECR/FIN)** called for splitting the tax and audit functions of the Big Four accountancy firm. The attending ICIJ journalists all agreed with her. The Guardian journalist went as far as claiming that law firms such as Appleby are only facilitators, whilst the Big Four are the true masterminds behind the offshore tax schemes and structures.

Moreover, **Miguel Urban Crespo (GUE-NGL/SPA)** asked the Commission what sanctions will apply on intermediaries that do not comply with the eventual mandatory disclosure rules.

In his reply, Commissioner Moscovici stated that it will be up to each member state to introduce dissuasive and effective national sanctions against non-compliance, and that these could include fines or administrative penalties amongst others, not to mention reputational damage. The Commissioner, however, also stated that "when the time comes", the Commission could also consider a EU-level approach (he did not specify whether he meant a EU-regime for sanctions, or something wider).

Otherwise, the hearing focused, mostly, on the list of non-cooperative jurisdictions that the member states approved on 5 December (see article below). MEPs were unhappy about what they see as member states watering down the list. Moreover, during the hearing it was confirmed that the PANA coordinators have agreed on the establishment of a temporary Committee to investigate Paradise Papers, as well as a permanent tax Committee to be formed after the 2019 EU elections.

European Parliament publishes tax intermediaries draft opinion, econ HOLDS HEARING – 29 November /7 dECEMBER

The European Parliament has published its draft opinion on the Commission's tax intermediaries proposal. The report has been prepared by the MEP **Emmanuel Maurel (S&D/FRA)**.

Mr. Maurel proposes, amongst other things, the following changes:

- Clarifies that an intermediary is anyone who devises tax arrangements in the course of providing tax, accounting, legal or financial services
- Member states should submit to the Commission a list of all intermediaries and taxpayers who have been subject to sanctions under the Directive. Moreover, the Commission should publish this list
- The provisions should retroactively cover all relevant cross-border tax arrangements from November 1993 onwards

This is merely a non-binding opinion, and does not bind the Commission or member states. However, the opinion is needed in order for the proposal to become EU law. In parallel, it appears that the upcoming Bulgarian Presidency is prioritising the file, and seeking a political agreement between member states as early as in March 2018.

ECON Committee holds first exchange of views on the proposal

ECON Committee MEPs held a first exchange of views on the tax intermediaries proposal and Mr. Maurel's draft report. During the hearing, representatives from each political Group presented their respective positions.

During the hearing, Emmanuel Maurel stated that citizens believe justifiably that there is impunity in the use of tax arrangements and tax dodging. The tax intermediaries proposal is one of the most effective measures as it targets the industry of tax avoidance.

Other highlights and key positions from other political Groups include the following:

- **Fulvio Martusciello (EPP/ITA):** the proposed 14-year retroactivity "needs more work"
- **Pirkko Ruohonen-Lerner (ECR/FIN):** the proposal is a positive step as it would oblige "tax consultants, accountants, lawyers and banks" to report to tax authorities. The information should be published, only this way there will be reputational disincentives
- **Lieve Wierinck (ALDE/BEL):** the administrative burden on intermediaries must be kept to a minimum. We need to guarantee the safety of commercially sensitive information. Hallmarks are too broad, but at the same time we cannot allow new loopholes – we need to find a balance on this
- **Molly Scott Cato (Greens-EFA/UK):** retroactivity – why limit to 14 years? The retroactivity should apply to all arrangements still in force. Our amendments will extend reporting obligations to schemes in one country as well. Moreover, auditors should have an obligation to report tax arrangements when they sign off financial statements. Tax administrations should be properly staffed

In terms of next steps, the deadline for amendments is 15 December. The consideration of amendments is currently scheduled for 11 January 2018, ECON Committee vote for 24-25 January, and a vote in Plenary for 2 February.

Council

ECOFIN on digital tax, non-cooperative jurisdictions, VAT for e-commerce – 5 December

This month's ECOFIN saw a number of pertinent developments and decisions in the area of tax. In particular, member states reached an agreement on the VAT for e-commerce package, the EU list of non-cooperative jurisdictions, as well as joint conclusions on the taxation of the digital economy.

VAT for e-commerce: German reservations addressed

Readers will recall that at the November ECOFIN meeting, Germany was at the forefront of blocking a political agreement on the Commission proposal on VAT for e-commerce. See Accountancy Europe's Tax Policy Update from 10 November.

The Estonian Presidency had put forward a compromise text addressing Germany's areas of concern. The compromise entails a statement that calls on the Commission to prepare implementing measures, particularly on the provisions relating to extending the OSS to online supplies of goods and all cross-border services to end-consumers.

The statement emphasizes that companies established in the EU should not be put at a competitive disadvantage. It also states that if it appears unlikely that detailed implementing measures can be adopted within a sufficient period of time to set the required technological systems in place, the Commission will assess by end-2019 whether Article 2 (on the OSS) can still be implemented in 2021. If not, the Commission should make a proposal to partially or fully postpone Articles 2 and 3 (removing the VAT exemption for small dispatches under €22) of the Directive.

The statement also includes an addition from Malta and Cyprus, in which they express their support for reinforcing administrative cooperation. However, they call on the Commission to consider in the future "adequate compensation in cases of a disproportionate burden on a member state". Reportedly, this statement was introduced as a result of the deletion of a provision allowing member states to take 5% of VAT collected for other member states.

List of non-cooperative jurisdictions adopted, not everyone left happy

The finance ministers also adopted the so-called EU list of non-cooperative jurisdictions.

The EU blacklist includes 17 jurisdictions that either did not respond to EU's communications or submitted insufficient commitments for reform. Reportedly, three of them submitted commitment letters at the last minute but this was too late. These jurisdictions are Bahrain, Guam, Granada, South Korea, Macau, the Marshall Islands, Mongolia, Namibia, Palau, St Lucia, Trinidad and Tobago, Tunisia, the United Arab Emirates, Panama and Barbados.

Another 47 jurisdictions have been added to a so-called grey list. Their commitments for reform were deemed as sufficient, but their delivery in terms of follow-up reforms will be subject to monitoring by the EU. These jurisdictions, which include Switzerland as well as British crown dependencies such as Jersey and Isle of Man, have made reform commitments in areas such as introducing economic substance requirements, ensuring fairer taxation and increasing transparency.

Should they not satisfy the EU's expectations, they may end up on the blacklist. Conversely, these jurisdictions can get de-listed completely if their reforms are comprehensive enough.

In terms of sanctions, the blacklisted jurisdictions will see their access to EU funding and support impaired. Moreover, EU member states are invited to apply their choice of possible sanctions on the jurisdictions, including non-deductibility of certain costs, CFC rules and a withholding tax. Finally, member states should apply at least one of the following administrative measures: reinforced monitoring of certain transactions, increased audit risks for

taxpayers benefiting from the regimes, and increased audit risks for taxpayers using structures or arrangements involving these jurisdictions.

This appears to mean that the list's main deterrent will, for the time being, derive from reputational damage caused by being named and shamed.

Segments of the civil society have already expressed their discontent with the adopted EU list. Oxfam notoriously published its own list of 'tax havens', arguably using largely the same criteria as employed by the EU. Oxfam's list consists of 35 jurisdictions, including four EU member states. ActionAid, for its part, criticized the list for not including a number of notorious tax havens such as Cayman Islands, Bermuda, Jersey and Guernsey.

Conclusions adopted on the taxation of the digital economy

EU member states approved their long-awaited conclusions on the taxation of the digital economy. They constitute a de facto mandate for the Commission's actions in this area, and will guide EU's negotiations at the OECD level.

As expected, the conclusions are rather ambiguous and much less specific than previous draft versions that were leaked in the past few weeks. For example, the conclusions no longer make reference to the C(C)CTB, and a paragraph elaborating on what could constitute a nexus for "digital presence" has been rendered less descriptive. And finally, the text now puts greater emphasis on the OECD-level, rather than EU-level action. This is the result of concerns from a number of member states, including Ireland, Luxembourg and Malta, who fear the impact of possible EU initiatives on their national tax bases.

A Commission proposal is currently to be expected for 28 March, although the date may yet change. It is likely to constitute of two elements: proposals for a short-term EU solution, and a proposal for a long-term solution possibly in the form of amendments to the CCCTB Directive.

Code of Conduct Group reports to the finance ministers

For the occasion of the ECOFIN meeting, the Code of Conduct Group submitted a report on its recent work and progress for the finance ministers' attention.

The report, for example, describes the group's progression with the list of non-cooperative jurisdictions, and includes guidance for the interpretation of the so-called Fourth Criterion. The Group also submitted for the finance ministers' attention some Guidelines setting working methods for an effective monitoring of Member States' compliance with the Code of Conduct Group's guidance.

During the ECOFIN meeting, the finance ministers adopted conclusions to guide further work of the Group. The conclusions endorse both the guidance for interpreting the Fourth Criterion as well as the Guidelines, and invites the Commission to revise past EU guidelines on transfer pricing issues.

Finally, ahead of the European Council Summit later this week, the finance ministers approved a report to EU Heads of Government on recent tax work undertaken by ECOFIN. The report provides a useful overview of recent progress on all key tax files at the EU-level.

Court of Justice of the EU – Rulings

C-42/17: Criminal proceedings for VAT infringements – 5 December

The Grand Chamber of the CJEU has ruled that in criminal proceedings for VAT infringements, a national court should not apply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the EU, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the member state concerned.

International

US Senate passes tax reform bill – 2 December

The US Senate has approved its own version of the tax reform bill. This follows a similar move by the House of Representatives a few weeks ago (see the Tax Policy Update from 24 November).

The approved Senate bill includes, notably, the following elements:

- Reduces the corporate tax rate from a maximum of 35% to a flat 20% rate (25% for personal services corporations)
- Limits the deductibility of net interest expenses to 30% of the business's adjusted taxable income
- Modifies the taxation of foreign income
- Imposes an excise tax on certain payments from domestic corporations to related foreign corporations

In terms of next steps, the House may now either approve the Senate's bill, or enter into negotiations with the Senate in order to find a mutually agreeable compromise.

Apple will see up to $47bn potential benefit from tax reform – 6 December

According to the Financial Times (article only available to subscribers), Apple will see a $47 billion benefit from the proposed US tax reforms. This benefit would be the result of the reduced tax rate that would be applied to foreign earnings that it currently holds outside of the US. Whilst the normal corporate tax rate applicable to Apple would be 35%, the Republicans' tax plan proposes a maximum of 14,5% rate regardless of whether the money is held on- or offshore.

OECD

OECD invites taxpayer input on fourth batch of Dispute Resolution peer reviews – 24 November

The OECD has opened a public consultation related to the dispute resolution peer reviews under BEPS Action 14.

Improving the tax treaty dispute resolution process is one of the top priorities of the OECD BEPS Project. The Mutual Agreement Procedure (MAP) peer review and monitoring process under BEPS Action 14 was launched in December 2016 with the peer reviews of the two first batches already completed and the third batch underway.

The peer review process is conducted in two stages. Under Stage 1, implementation of the Action 14 minimum standard is evaluated for Inclusive Framework members. Stage 2 focuses on monitoring the follow-up of the recommendations resulting from jurisdictions' Stage 1 report.

The OECD is now gathering input for the Stage 1 peer reviews of Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal, and invites taxpayers to submit input on specific issues relating to access to MAP, clarity and availability of MAP guidance and the timely implementation of MAP agreements for each of these jurisdictions.

The deadline for responding is 22 December.

OECD releases mutual agreement procedure (MAP) statistics for 2016 – 27 November

The OECD has published new statistics on the mutual agreement procedure (MAP), covering 2016.

The statistics reveal, notably, the following:

- In comparison to the 2015 MAP statistics, both the number of MAP cases in start inventory and the number of started MAP cases have increased, which results from both an increase in the number of reporting jurisdictions and modified counting rules
- Approximately 8,000 cases were in the inventory of the reporting jurisdictions as of 1 January 2016 and almost 25% of them were closed during 2016
- Almost 1,500 cases started on or after 1 January 2016, and approximately 25% of them were already closed in 2016
- Transfer pricing cases account for slightly more than half of the MAP cases in inventory
- Transfer pricing cases take more time on average than other cases: approximately 30 months are needed for transfer pricing cases and 17 months for other cases
- Over 85% of MAPs concluded in 2016 resolved the issue. Almost 60% of MAP cases closed were resolved with an agreement fully resolving the taxation not in accordance with the tax treaty and almost 20% of them were granted a unilateral relief while almost 5% were resolved via domestic remedy
- 5% of the MAP cases closed were withdrawn by taxpayers while approximately 10% were not resolved for various reasons

OECD releases further guidance for tax administrations and MNE Groups on CBCR – 30 November

The Inclusive Framework on BEPS has released additional guidance to give certainty to tax administrations and MNE Groups alike on the implementation of CBCR under BEPS Action 13.

The additional guidance addresses specific issues, such as how to report amounts taken from financial statements prepared using fair value accounting; how to treat a negative figure for accumulated earnings in Table 1; how to treat mergers/acquisitions/de-mergers; how to treat short accounting periods; and the definition of total consolidated group revenue.

OECD releases first peer reviews of the BEPS Action 5 minimum standard on spontaneous exchange on tax rulings – 4 December

The OECD has released the first analysis of individual countries' progress in spontaneously exchanging information on tax rulings in accordance with BEPS Action 5 ((countering harmful tax practices).

This first annual report on the exchange of information on rulings evaluates how 44 countries, including all OECD members and all G20 countries, are implementing Action 5's provisions. Action 5 is one of the four minimum standards out of all the BEPS Actions.

State Aid

IRELAND FORCED TO COLLECT €13BN IN TAX FROM APPLE THAT IT DOESN'T WANT – 5/7 December

Ireland has reached an agreement with Apple on the collection of €13 billion in taxes from the company. This is the result of the European Commission's ruling which concluded that Ireland had for years granted illegal state aid to Apple in the form of favourable tax treatment.

Both Apple and Ireland are judging the Commission's decision in the Court of Justice of the EU (CJEU). While waiting for CJEU's final decision, the sum of €13 billion will be based on a special escrow fund.

Despite both parties reaching an agreement, the Commission has already referred Ireland to CJEU back in October this year for failing to collect the money from Apple within the provided timeframe.

Other News

Tax avoidance by big firms is morally wrong, say nine out of 10 in UK – 27 November

According to a poll of over 2000 respondents, 90% of the British believe that tax avoidance by large companies is immoral, even if formally allowed by law. Moreover, about 25% of the respondents stated that they are boycotting a company due to its tax behaviours, with another 43% considering a boycott.

GUE-NGL publishes study on C(C)CTB – 28 November

The European Parliament's far-Left political Group GUE-NGL has published a new study on C(C)CTB.

According to the study, C(C)CTB would provide new loopholes that would allow multinationals to keep shifting their profits abroad. It focuses on the likely impact on member states' corporate tax bases in a range of different scenarios.

The research claims that the CCCTB would result in a major redistribution of tax base among member states – at the expense of those members positioned aggressively as profit-shifting hubs. One problem highlighted in the report is that profit-shifting outside of the EU is not addressed by the CCCTB, and the authors call for a worldwide approach so that profit-shifting within and out of the EU can be accounted for. The study also claims that opting for CCCTB now is irresponsible since it relies solely on insufficient data from private databases, whereas more reliable data from CBCR will be released in due course.

Greens-EFA: Tax must be at the heart of Brexit negotiations – 31 November

The Greens-EFA Group of the European Parliament has called in its new report for tax to be integrated as a central theme of the ongoing Brexit negotiations.

The report looks at how the UK has established itself as a global "tax haven", and calls on the EU to use the opportunity of Brexit to challenge the UK's "dodgy activities", particularly in regard to the status of its overseas territories. These reforms should, in the Greens' view, be condition of any future economic relationship with the UK.

Events

- 30/01/2018, ***Public hearing on simpler withholding tax procedures for Europe***, European Commission, Brussels. Source